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TESTIMONY BEFORE THE
HOUSE COMMITTEE ON GOVERNMENT REFORM

by Professor Charles Tiefer

ANALYZING THE PROPOSED SERVICES ACQUISITION REFORM ACT

Thank you for the opportunity to testify on the reoffered AServices Acquisition Reform Act.≅ I am Professor of Government Contracts at the University of Baltimore Law School and the author of GOVERNMENT CONTRACT LAW: CASES AND MATERIALS (Carolina Academic Press 1999 & annual supplements)(co-authored with William A. Shook).

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OVERALL
The Best and Worst Changes in SARA

Let us start with praise about a major change in the SARA version from the last Congress. Hitherto, it had a special thrust: sections 602 and 603 to prohibit flow-down of Service Contract Act (SCA) and Davis-Bacon Act (DBA) requirements to certain subcontractors. I suggested in my last SARA testimony that repeals of SCA and DBA were Adeal-killers≅ because their inclusion gave the whole bill an anti-labor reputation. Omission, in this Congress, of these provisions lifts SARA out of those particularly polarizing controversies. Chairman Davis deserves praise for dropping those. I appreciated the courtesy shown by the Chairman

and Ranking Minority Member inviting me to testify and hope that what I say, although often critical of specific provisions, will be of value.

SARA, as a whole, raises concerns because many of its diverse provisions outrun the stated general justifications for relaxing procurement safeguards. In other words, while proponents of SARA still repeat as slogans the rationales given in the past decade for "acquisition reform," SARA's actual provisions do not supply alternative disciplines when creating loopholes in full competition and procurement safeguards. The new rationale, of giving out "incentives" to favored contractors without alternative disciplines, risks just producing a Christmas tree of procurement giveaways.

To spell this out: Congress reformed the procurement system in the 1980s, in the wake of major scandals about non-competitive (often sole-source) and wasteful procurement. Congress required formal Afull and open≅ competition in the Competition in Contracting Act (CICA). And, Congress strengthened the other safeguards against waste, fraud, and abuse, such as pricing disclosure under the Truth in Negotiations Act (TINA), accounting consistency under the Cost Accounting Standards (CAS), and the other safeguards throughout the Federal Acquisition Regulation (FAR).

Classic "acquisition reform" in FASA in 1994 and FARA in 1996 relaxed those requirements of formal competition and safeguards – selectively. FASA and FARA proponents risked doing so – selectively - even without the discipline of a fully functioning private market in commercial items under the traditional definitions. They relaxed those safeguards by relying upon the presence of the alternative discipline - some private market analogue or some commercial item characteristics, or the small scale of purchases under a low threshold, to justify letting go of formal competition and safeguards. I discussed this direction in *Congress and Commercial Procurement*, 32 Procurement Lawyer, Spring 1997, at 22 (co-authored with Ron Stroman, former committee counsel).

SARA's diverse provisions depart in a wholly new direction, even though its proponents still give lip service to the previous rationales for acquisition reform. Many SARA provisions allow an ending of formal competition and/or the relaxing of safeguards simply as Aincentives≅ for procurement. Some do not even have dollar ceilings as fall-back limits on the scale of government exposure to abuses.

Such further reduction of formal competition deserves careful scrutiny. The Associated Press reported (4/1/2002) that, of $230 billion in federal contracts, $123 billion, or more than half, were awarded without full competition. Indeed, a third, or 34 percent, were awarded with no bids at all. These are very serious figures. They confirm the findings of inspectors general, the General Accounting Office, and other reliable institutions. Push this too much further by the least justified provisions in SARA, and formal competition becomes an endangered species. AHappy talk≅ by industry trade associations about how there is more competition than ever, rings hollow. The press and the public rightly believe their own eyes instead.

Hence, further loopholes in CICA, TINA, CAS, and other competition requirements and safeguards, particularly in the absence of alternative disciplines, exacerbate existing problems reported by the Project on Government Oversight, *Pick Pocketing the Taxpayer: The Insidious Effects of Acquisition Reform* (2002) and by Professor Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 Am. U. L. Rev. 627 (2001).

Undigested New Policies

Also, there is particular reason for caution in recent undigested new policies on the subject areas of SARA. For one, on top of FASA and FARA, Congress in 2002 created the Homeland Security Department, and passed the Ae-government≅ act, both of which moved the government quite far along in procurement innovations relaxing competition requirements and traditional safeguards. At best, these new policies have not had time for testing, checking, and refining. For example, the Share-in-Savings provision of the E-Government Act provides for a GAO report after six months. Surely the lessons in that report should be learned before further steps are taken.

Moreover, the subject of services also has a central place in the new version of OMB A-76, proposed in November 2002, approaching finalization soon, which will change the system for public-private competitions. The risk exists for an unhealthy combined effect by the experiments of SARA to forego formal competition and the experiments of OMB A-76 to forego traditional safeguards in public-private competition. Provisions like "Share-in-Savings," or the revolving door of "government-business exchanges," could augment the tendency of the new A-76 toward contracting-out for the contractors' sake rather than only for the public interest. Provisions like extending contract terms to create "contractors-for-life" would then get in the way of what new A-76 ostensibly offers, to let public employees compete for work at the expiration of private contracts.

Imagine dismantling the IRS, the Social Security Administration, and the Federal Prison System under the combination of new A-76 and SARA, and the picture is the opposite of reassuring . As a result of the combination of new A-76 and SARA, the government could informally, and without full competition, make the decision to shut down superior in-house operations without competition, dismantle irretrievably its proven work force, and expose itself to mission failure, waste and abuses. The same upcoming issue of the newsletter of the Federal Bar Association=s Government Contracts Section which includes a piece about SARA, also includes an article of mine about problems in the new A-76. That piece is incorporated herein by reference.

Potential Controversies – Halliburton, Bechtel

Some may wonder whether there is that much potential to embarrass the Congress or the agencies by these seemingly technical and obscure SARA departures from formal competition and safeguards. In the services context, recently a particularly dramatic example of sole-source awarding came with the Defense Department contract to Halliburton for services in Iraq, followed by less-than-full-competition by the Agency for International Department for Iraq postwar reconstruction such as in the large contract to Bechtel. Without getting into the detailed arguments, at a minimum, these controversies - some respected editorial pages have used stronger terms to describe these than mere controversies - show how exemptions from full and open competition operate even under existing law.

Some provisions of SARA would open the door specifically for contracts like Halliburton's and Bechtel's with more controversies even than just occurred. The public=s confidence in the procurement system once it moves away from full competition, and other safeguards, turns out to be limited and fragile. It makes more sense for Congress to bolster that

confidence than to strain it further. If anything, the corporate accounting scandals of the last year from Enron on – involving government contractors and payees from Halliburton to Worldcom to HealthSouth - should suggest caution about "incentive" provisions in SARA which put blind faith in the public-spiritedness of contractor accounting.

Broad Scope for Amendments

A last overall point: With this year's changes, the overwhelming majority of SARA's diverse provisions do not concern services specifically. It is noteworthy that, unlike Title IV's title in last year's version, which referred to "Services," this year, the use of the term "Items" in the title frankly concedes that provisions have to do with "incentives" to providers of everything, not just services. And Titles V as to "Other Items," also are for non-services providers.

At least in the last Congress, the provisions to partially repeal the SCA and DBA, although controversial (and wisely omitted now) did focus upon services. In this Congress, only a handful of provisions even arguably just concern services. Quietly, the ambitions behind the bill have become universal as to all procurement, not just services. I suppose bills that start at full committee, rather than subcommittee, tend to express such larger ambitions.

What are the legislative implications of the bill now ambitiously dealing with all procurement and no longer being focused just upon services? For one thing, it means the widest scope of germaneness for amendments about procurement, no longer facing the argument that unless the amendments concern services, they fail to relate to the bill's subject. An elementary rule of germaneness, is that to a bill containing several propositions, an amendment that would add another of the same class is germane. (See Charles Tiefer, Congressional Practice and Procedure, at 435 (1989)(citing House Manual section 798g.).)

SARA's diverse propositions, no longer limited to services, afford every reason to consider, as germane, provisions for amendments dealing with other aspects of procurement not limited to services. You might simply ask the Parliamentarian whether this is a narrowly focused "services" bill any more: he will tell you that having the word "Services" in the bill's title alone does not significantly narrow the scope of germane amendments, and having a major subtitle be a grab-bag called rightly just "Other Matters" confirms the scope is not narrow.

So, just to recall a few of the recent procurement issues in the news, properly drafted amendments might appropriately be offered to address:

arbitrary quotas for contracting-out;

procurement from expatriate companies;

lack of sunshine in Iraq reconstruction contracts;

My testimony points out various provisions that logically invite amendments of these kinds, and, has a section at the end on this subject

Section-by-Section: SARA=s Titles

The comments here will be organized title-by-title by the proposals in the draft for the Services Acquisition Reform Act (SARA).

Titles I and II – Workforce and Training, and, Business Practices

A section creates a fund, handled outside the appropriations system by the Federal Acquisition Institute (FAI), for training. No doubt proponents of this provision will quote selectively from the GAO report for this Committee, "Agencies Can Improve Training on New Initiatives," January 2003.

The Federal Acquisition Institute seems to have other interests in mind than teaching procurement officials to be zealous about fostering formal competition and about being strict about the rules against waste, fraud, and abuse. If the committee is facing a debate with appropriators about end-running the appropriations system, it would do better if some of the training funds were earmarked for fighting for competition and against waste, fraud, and abuse.

Another section creates a kind of revolving door program for swapping "acquisition professionals" temporarily between public and private sector posts. This provision seems fraught with conflict of interest potentials. It would bring persons whose obvious loyalties tie them to their permanent private employer, very temporarily into public sector acquisition posts. There they have access both to sensitive inside information and, more generally, every reason to scope out questionable courses of action, such as how to advantage their permanent private employer in a play to contract out the work they see while inside. Conversely, it would give public officials an opportunity to scope out post-employment opportunities that would compromise their loyalties when they return to the public sector. The potential for conflicts in this provision are familiar from the Procurement Integrity Act (PIA). Making the private detailees into temporary public "employees" for the applicability of the PIA and other statutes hardly mitigates the conflict; they do not have to be crooked, to put the interest of their permanent private employer first and the public interest second. This provision combines unhealthily with the new A-76.

A section would establish an advisory panel to review laws and regulations that Ahinder≅ the use of commercial practices and other matters, which would report in a year. Many aspects of this section are discouraging. First, the panel=s mandate lacks even a pretense of awaiting the evidence before deciding the direction. The panel cannot consider, apparently, the respects in which problems with the already-introduced practices of those kinds require addressing, such as, as the AP reported, sole-source awards have already risen to a third of the total.

Second, saying the panel membership should reflect Adiverse experience in the public and private sectors≅ creates the illusion but not the reality of true balance. No mention occurs of public employee labor organizations, a key perspective. No mention occurs of other voices that balance the self-interest of contractor trade associations: the voices of the government=s own experts on waste such as inspectors general; the government=s experts on procurement law and policy in the government=s internal academies such as the Judge Advocate General School and the Defense Acquisition University; private academics of diverse persuasions such as those in the George Washington University program on government contracting; public interest groups of diverse persuasions; and, all labor organizations, private and public alike. ADiverse experience in the public and private sectors≅ portends a heavy predominance, if not a unanimous front, of figures currently working for or with the contractor trade associations, simply possessing past government experience. Unbalanced, biased panels just portend future trade association wish

lists with a government imprimatur.

I also note that in making appointments, the Administrator of OFPP is to consult with Congressional committees, but need not particularly consult with the minority. SARA should not ignore the lessons from the period when Democrats were in the majority, when the obtaining of balance by inclusion of such distinguished minority members as William Cohen and Frank Horton - real choices of the then-minority party - brought breadth of perspective and true bipartisanship to the advisory panels.

Third, each revision of SARA seems to make the panel's mandate more and more like trade association wish lists. It now adds "the use of Governmentwide contracts" to what the panel should look to overcome hindrances. Such contracts (known as "GWACs") have become a principal vehicle for cutting back on full and open competition, and for reducing the availability of legal protests that ventilate violations of law and regulations.

Title III - Contract Incentives

Excessively Risky Share-in-Savings

Section 301 would dramatically expand AShare-in-Savings,≅ a new type of contracting with large risks for the government. Late in 2002, Congress already undertaook a large-scale experiment with AShare-in-Savings≅ for IT procurement, pursuant to section 210 of the E-Government Act of 2002, Pub. L. 107-347 (codified at 10 U.S.C. 2332 and 41 U.S.C. 317). In contrast to the E-Government provisions, SARA=s provision would authorize Ashare-in-savings≅ beyond information technology, to any kind of contracts. What this does is tear down the single rationale that justified the experiment in the E-Government Act. The rationale was that IT procurement offers a field of such unique and powerful opportunities for the government to catch up with fast-moving technological advance, to justify all the downsides of SIS. SARA=s provision completely lacks that rationale. Nothing would apparently prevent the providers of any services from abusive private debt collectors offering to replace the IRS, to sloppy private airport screeners offering to replace the TSA, from making sweetheart Share-in-Savings deals.

In 2002, I prepared a full-length critique of AShare-in-Savings,≅ available through the website of the Project on Government Oversight, which is incorporated here by reference. AShare-in-Savings≅ contracts are a form of long-term backdoor spending which locks the government into potentially sweetheart deals to particular favored contractors. It cuts out the appropriators and other overseers. It precludes the government from the often-superior alternative of making its own changes over time, either in how it does work in-house or in how it would contract-out the work.

Presumably proponents of SIS will mention a GAO study for this Committee, "Commercial Use of Share-in-Savings Contracting," January 2003. It looked at four commercial SIS contracts. One noteworthy finding of the GAO study was that one of the "key conditions facilitat[ing] the development and execution of the SIS contracts . . . . SIS contracting is attractive to clients who (1) *do not have the funds for*, or choose not to pay, some or all of the up front costs of a needed project and (b) *are willing to pay the premium SIS contractors charge for*

putting some or all of their compensation at risk." Of course, the federal government is the last entity in the world that should choose to pay the premium charged by SIS contractors for effectively lending the government the up front costs of a project. If there is one single thing the federal government wastes money doing, it is borrowing through a back door from contractors paying a high interest rate, instead of raising funds itself through borrowing by the Treasury at a much lower interest rate.

So, even the GAO study simply underlines how wasteful it is for the government to enter SIS contracts and pay a premium to SIS contractors for them to conduct back-door borrowing for the government. Parenthetically, that GAO study sets a new record for narrow, tailored, slanted design of a study not to measure whether legislation actually serves a good purpose, but just meant to support a preconceived proposal. The GAO was told to look at, and looked at, four successful private SIS contracts. It proves only that there are four successful private SIS contracts. It says nothing about when SIS contracts would have merit in the public sector, let alone warrant wide-open launching, beyond what the E-Government Act did, by the provision suggested by SARA. Quite the contrary, in a slip from the script, the GAO study quotes that "according to GSA officials, federal agencies have difficulty in measuring baseline costs," meaning that an SIS contract will malfunction in the context of federal agencies because the essential starting point of well-measured baseline costs is absent.

Entrenching Incumbents: Extended Contract Terms

This could be called the "Contractor for Life" provision. The "Incentives for Contract Efficiency" section would let service contracts have options for extension by an unlimited number of periods, each of unlimited duration, awarded for Aexceptional performance.≅ Traditionally, CICA required full and open competition. At the end of a contract's performance period, when the agency could competitively compete the successor contract, renewal of the incumbent contractor without competition is simply an exacerbated form of behind-closed-doors, sole-source procurement. Nothing in this provision limits such extensions to contracts of any particular size, nor to contracts competed even the first time, nor is it clear how a potential competitor could protest. So, the section promotes: a system in which even giant contracts get initially sole-sourcing; and then, have no competition at the five, ten, fifteen, and twenty year mark, as the "Contractor-for-Life" steps up its own monopoly profits.

An agency that is short-handed as to acquisition personnel, captured by well-connected contractors using every tool to entrench themselves permanently, and not under any meaningful counter-pressure to fight for competition and change, may succumb simply to signing the paperwork to renew the contractor over and over. Having "performance-based" standards does not constrain the entrenchment much.

This is another of those provisions that combines in an unhealthy way with the new A-76. When the Administration justifies the new A-76, it espouses a theory that both public and private providers should periodically re-compete at the end of their contract, such as with an iron-clad five year time limit on public employees having the work. Service contractor trade associations oppose the serious legislative proposals in Congress, like Rep. Wynn's bill to compel supervision of private contractors with an eye toward efficiently bringing private work back into the government, with the argument to let new A-76 take care of that. But, if SARA has provisions for unlimited extensions of the period of private service contracts, then those private

contracts will not receive periodic competitions even as to other private bidders, let alone public-private competitions. Hence, the result becomes: new A-76 gives repeated opportunities every few years to terminate the public performance of the work without full formal public-private competitions; after the work goes even a single time to a private contractor, then this SARA provision lets the private contractor keep the work thereafter without any later competition.

In germaneness terms, this provision provides a natural example of why the bill can carry provisions like anti-contracting-out-quota amendments.

Title IV - Commercial Items

"Commercial Items" Without Market Discipline

Section 401 treats service contracts as a "commercial item" just by requesting it by performance-based specifications. That means foregoing full and open competition and a number of safeguards. The provision had no time limit and does not impose a dollar ceiling; any future billion-dollar service contract could get this treatment. (A stated $5 million ceiling only applies to the further relaxation, beyond commercial treatment, of simplified acquisition treatment.)

With no dollar ceiling at all, this becomes one of SARA's provisions that foregoes competition and safeguards on a potentially vast scale. Requiring that the source must provide "similar services to the general public" only puts in place a loose and inadequate safeguard, because this slack, vague phrase contrasts with the traditional much stricter terms for true private market discipline. For example, a contractor wanting to exploit this provision can just offer something "similar" to the public regardless of its being so overpriced or specialized that no one except the federal government buys it. Suppose a defense contractor selling warplanes, like United Technologies, wants a billion dollar contract, without competition or safeguards, at an inflated price, to service them. It need merely post, on its public offerings for civilian buyers, a "similar" service. Even if no one buys because of the inflated price, now it qualifies for this section 401 exemption.

The Federal Acquisition Regulation (FAR) already has provisions favoring performance-based contracting, in FAR Part 37. These were boosted by section 831 of the FY 2001 DOD Authorization (Pub. L. No. 106-398), through regulations published at 66 Fed. Reg. 22082 (May 2, 2001). There is a pilot program established by section 821 of the same act, which allows commercial item acquisition methods, within defined limits, by the DOD for performance-based contracting. That is enough. Going from a time-limited pilot program, with ceilings, to the wide-open opposite, is too much. Section 401 opens an unlimited loophole.

Deeming T&M and L-H Contracts to be Commercial-Type Contract Vehicles

This section deems time and material (T&M) and labor-hour (L-H) contracts amenable for commercial treatment, that is, exempt from full competition and safeguards. T&M and L-H are like cost-reimbursement contracts in that the main risks - of how much the service will cost, which depends upon how much labor time and how much materials will be used - are carried by the government, not the contractor. For years, contractor trade associations have continued to push to obtain what the sensible compromises in FASA and FARA withheld. See Richard J. Wall & Christopher B. Pockney, *Contracting for Commercial Professional and Technical*

Services: The Federal Acquisition Streamlining Act=s Unfinished Business, 76 BNA Fed. Cont. Rep. 76 (July 17, 2001). This provision gives it to them. The experience of Inspectors General with cost-inflation in T&M contracts has been disregarded. So has the holding by the GSBCA that "the time and materials order falls within the broad genre of cost-reimbursement type contracts. This type of contract places relatively little cost or performance risk on the contractor, in contrast to a fixed price contract . . . ." CACI, Inc-Federal v. GSA, GSBCA No. 15588 (Dec. 13, 2002).

Again, as with the previous section, there is no ceiling; this could be a billion-dollar contract. The standard here – that these be "commonly sold to the general public through such contracts" – although less slack than the previous section, is still quite slack in that it does not even require that there even be an established market rate for a task. More important, the T&M and L-H contract form puts the main cost and performance risks on the government, and a contractor can inflate the rate or the number of hours, or cut the quality, in the absence of competition and safeguards.

For example, suppose some construction contractors do some of their private work on a fixed-price basis, and some on a T&M basis. Will we be better off if billion-dollar run-of-the-mill construction work given by the government to Bechtel shifts from fixed-price, with competition holding down prices, to T&M, where, after contract award, the taxpayer's charge can rise without limit? Suppose contractors like Argenbright, which did a grossly low-quality job of airport screening until the 9/11 attacks, could now obtain a billion-dollar contract to perform protective services for the federal government on an L-H basis, without full competition or safeguards to constrain the performance risk. Contractors like Argenbright may well be able to note that they commonly sell such services on an L-H basis to the private sector of low-budget retailers. Does that mean you would feel secure about the performance risks in guarding the Capitol with Argenbright's type of screeners in a procurement process without full competition and safeguards, or, might you worry that they would cut the quality of their protective services as this provision incentivizes them to do?

Relaxing CAS and TINA for "Commercial Business Entities"

The Associated Press has already reported this section as a giant giveaway for the biggest traditional defense contractors. GAO Plan Eases Minimum Bid on Defense Pacts, Associated Press, April 9, 2003. This section relaxes CAS and TINA for selected contractors. This is not limited to services. In effect, this provision is a partial repeal of CAS and TINA even for sole-source contracts by contractors selling the largest, most completely noncommercial weapons systems to the Pentagon.

There is every reason not to repeal, even partially in this way, CAS and TINA. As for TINA, Congress enacted it precisely because contractors were able to grossly overcharge the government in the absence of the mandatory TINA disclosure of cost and pricing data and the capacity of the government to recover for defective pricing. As for CAS, this would let contractors with big-ticket firm fixed-price contracts have them be exempt from cost accounting standards. This will let them play accounting games, as to the allocation of costs between those contracts and the cost-reimbursement items often produced in the same shop.

This section's current wording says "The term 'commercial entity' means any enterprise whose primary customers are other than the Federal Government." So, this section apparently

continues to count, for deeming an enterprise to be a "commercial entity," customers which themselves are primary contractors of the Federal Government engaged in traditional defense limited-competition big-ticket item contracting. For example, when General Dynamics and Lockheed Martin each subcontract with the other to produce subsystems for major weapons systems – say, one makes the avionics, the other makes the plane, and the plane is sold to the government under the most traditional basis of a defense procurement with sole-source or limited competition - the SARA provision counts those subcontracts toward considering GD and Lockheed Martin as being in the private, commercial, nongovernmental market. This does not advance the goal of bringing nontraditional contractors to sell to the government. And, this does not substitute an alternative discipline for giving up CAS and TINA. It simply repeals the safeguards against abuses.

Title V – Other Matters

Opening the AOther Transactions≅Authority Super-Exemption

A provision of SARA opens up the use of the super-exemption called Aother transactions≅ (OT) authority. OT authority exempts the contractor from every safeguard extant starting with the FAR, the statutory charters (FPASA and ASPA), CICA, FASA, FARA, and even the Federal Grant and Cooperative Agreement Act. The Defense Department received OT authority, only for the specific and narrow purpose of research and development, and prototypes, to obtain advance technology of ultimately military value from nontraditional suppliers – not just commercial companies, but, say, small high-technology firms completely without the willingness to comply with the most rudimentary governmental rules or to cope with the most basic governmental principles on intellectual property. The Homeland Security Act of 2002 extended OT to that department.

Even in those narrow contexts, OT raises concerns. When the GAO took a look at the actual experience of DOD=s use of OT, it found that of 97 contractors with OT agreements, 84 were traditional defense contractors. *Acquisition Reform: DOD=s Guidance on Using Section 845 Agreements Could Be Improved*, GAO/NSIAD 00-33, April 7, 2000. This strongly suggests that even under existing law, OT does not actually get used to bring in nontraditional suppliers, but simply immunizes traditional ones from vital, basic legal requirements. As for extending OT to DHS, it shows how a seemingly simple extension of OT turns out to be fraught with ambiguities, uncertainties and loopholes. See Joseph Summerhill, Procurement Within the Department of Homeland Security: A Brief Overview of the Homeland Security Act of 2002, The Procurement Lawyer, Winter 2003, at 11. OT is not just commercial treatment. It is like a license to take the government's money but be outside of the procurement law – all of that law.

This section would extend OT authority throughout all civilian agencies, including not just research and development but prototype projects as well, whenever it is for Adefense≅ or "response" against various kinds of loosely-defined Aattack≅ under the umbrella of terrorism. By making it government-wide under loose definitions, it becomes a permanent super-exemption, far beyond what the casual reader may think is the provision=s core purpose DHS was a sprawling department, but, at least, it is just one department. For the government as a whole, as this section would extend OT, it is not clear what gets swept up in this loose definition. For example, almost any civilian IT prototype project of the government, even, say, upgrading

the environmental-management IT for EPA or the Park Service, must have some kind of security (Adefense≅) against hackers. A Adefense≅ primarily against anyone, like ordinary hackers, might, some would argue, also serves as a Adefense≅ for this provision. Almost any civilian law enforcement prototype project of the government, even, say, the collection work of the IRS or the incarceration work of the Federal Prison System might, some would argue, be pressed into service after an Aattack.≅ It is not clear whether the OT super-exemption provision could thus expand to apply to traditional contractors conducting mundane daily activity. Section 502 thus typifies the provisions in SARA that relax safeguards without competition or market disciplines of any kind, just as a giveaway termed an "incentive."

"Emergency Procurement Flexibility" - Contracts for Halliburton and Bechtel Without Safeguards?

Recently, a firestorm of controversy surrounded contracts for Halliburton, Bechtel and others relating to Iraq. I have done a fair amount of discussion in the print and broadcast coverage about this and thereby acquired some familiarity with the procurement issues. Much suspicion developed because the contracting methods relaxed key safeguards: the Defense Department made its contract with Halliburton on a sole-source basis; AID reduced competition and invited contractors like Bechtel for a truncated and initially secret proceeding. It is important to review carefully provisions like this one that, while blandly and technically worded, could allow contracts of this kind to Halliburton and Bechtel, on a permanent basis, while foregoing basic safeguards.

This warrants some background. The Homeland Security Act relaxed an array of procurement safeguards for DHS itself permanently in section 833, and, throughout the government in Subtitle F, for one year, for anything usable in loosely-defined Adefense≅ or "response" to listed dangers. Subtitle F was only for one year. Section 601 makes that one-year government-wide lapse in safeguards, permanent. The Halliburton and Bechtel contracts would not be all that hard for officials sympathetic to those contractors to fit into this exemption's definition, by saying that the contracts are part of an occupation said to be a pre-emptive "response" to the listed dangers. I have seen no disclaimer by the Administration against applying Subtitle F to Iraq reconstruction contracts, and, of course, that process has been so marked by lack of sunshine in this regard that bipartisan sunshine bills have been introduced.

What these SARA provisions would permanently relax for Halliburton and Bechtel-type contracts makes for truly wide-open exemption: for example, the exemptions from CAS and TINA hitherto reserved for Acommercial≅ items, meaning, those with real private market competition, get opened up literally for Aany≅ items, government-wide. (Section 855 states that: the exemptions for commercial items would apply Awithout regard to whether the property or services are commercial items.≅)

Moreover, presumably this section could operate to define the work by Halliburton and Bechtel, in cost-reimbursement contracts, as "commercial" items, exempting them from CAS and perhaps even from the FAR Cost Principles as to allowability of items. While some still hope that Subtitle F cannot transform cost-reimbursement into commercial contracting, it is hard to be sure: these provisions have been drafted very loosely, evidently to afford total immunity from traditional safeguards.

Treating their work as "commercial" items under this provision might well free

Halliburton and Bechtel to play accounting games with their large contracts. For example, each contractor has plenty of other fixed-price government contracts. By shifting costs from those contracts to these (easily enough done as to executive pay, pension contributions, etc. once the contractor is released from the disclosure and consistency requirements of CAS), Halliburton and Bechtel could inflate their costs under these contracts, and pocket extra profits on the other ones. Freed from cost principles about allowability, Halliburton might even use the government's own money to lobby the Congressmen voting for this provision by wining and dining them at vacation facilities and then getting government reimbursement.

Those who disbelieve this, are just not familiar with what just how "liberating" it is to the big cost-reimbursement contractors like Bechtel and Halliburton to be exempt from CAS and the cost allowability rules. Recall that though indemnification is classically reserved for ultrahazardous nuclear and rocket-launching activity, not just construction in a postwar zone, the White House gave Bechtel the sweetener of government indemnification on its contract for any negligence as to, say, unexploded land mines, a real act of White House generosity. Why would the White House not give Bechtel and Halliburton generous section 601 treatment too?

The provision adds some more lapses of safeguards too. It extends the fuller range of commercial item exemptions in section 833 (not previously fully in section 855(a)(2)), and extends the simplified acquisition relaxations in section 853 (not previously fully in section 855(b)), to the new permanent government-wide basis.

It seems like this section renders germane any reasonable amendments to let the sunshine in on Iraq reconstruction contracts.

Amendments to Consider for SARA

Sunshine In Iraq Reconstruction Contracting

As mentioned above, problems that have emerged as to lack of sunshine and sole-source or limited-competition arrangements in the Bechtel and Halliburton contracts relating to postwar Iraq. Some of these problems have been highlighted by a request for an investigation by Rep. Waxman, among others, to the General Accounting Office. A procurement reform to address this is in a bill cosponsored by Senators Wyden and Collins, among others, S. 876. Here is that language, omitting some of the later details (lists of committees):

(a) DISCLOSURE REQUIRED.-
(1) PUBLICATION AND PUBLIC AVAILABILITY.-The head of an executive agency of the United States that enters into a contract for the repair, maintenance, rehabilitation, or construction of infrastructure in Iraq without full and open competition shall publish in the Federal Register or Commerce Business Daily and otherwise make available to the public, not later than 30 days after the date on which the contract is entered into, the following information:
(A) The amount of the contract.
(B) A brief description of the scope of the contract.
(C) A discussion of how the executive agency identified, and solicited offers from, potential contractors to perform the contract, together with a list of the potential contractors that were issued solicitations for the offers.
(D) The justification and approval documents on which was based the determination to use

procedures other than procedures that provide for full and open competition.
(b) CLASSIFIED INFORMATION.- (1) AUTHORITY TO WITHHOLD.-The head of an executive agency may- (A) withhold from publication and disclosure under subsection (a) any document that is classified for restricted access in accordance with an Executive order in the interest of national defense or foreign policy; and (B) make it available to the Senate and House committees of jurisdiction.

Quotas in Contracting-Out

In the last Congress, the problem of quotas for contracting-out received much consideration. A somewhat limited provision, dealing only with "arbitrary" quotas, received enactment in the omnibus continuing resolution. The House itself had adopted language, proposed by Rep. Moran and supported by Rep. Davis, quoted here:

"None of the funds made available in this Act may be used by an executive agency to establish, apply, or enforce any numerical goal, target, or quota for subjecting the employees of the agency to public-private competitions or converting such employees or the work performed by such employees to private contractor performance under Office of Management and Budget Circular A-76 or any other administrative regulation, directive, or policy."

Because SARA is not an appropriation bill, the following language is suggested, just revising the terms that relate to appropriation limitation:

"No executive agency shall request proposals, award contracts, or otherwise use its procurement authority to establish, apply, enforce, implement, or attain any numerical goal, target, or quota for subjecting the employees of the agency to public-private competitions or converting such employees or the work performed by such employees to private contractor performance under Office of Management and Budget Circular A-76 or any other administrative regulation, directive, or policy."

The argument for this provision was ably made by Rep. Davis, quoted here from 148 Cong. Rec. H5324 (July 24, 2002)

Mr. TOM DAVIS of Virginia.
Mr. Chairman, I rise to speak in favor of the amendment. The question has always been do we take a matter in-house or outsource it. The overriding goal of procurement policy should always be, how did we get the best value for the American taxpayer, period; how do we pay the least cost for the best service. Sometimes this can best be done in-house with trained Federal workers who have done something over a long period of time. Sometimes it can be done more efficiently by taking it out to the private sector. Sometimes it can be done because the private sector has a certain expertise and experience level we just cannot get through the Federal employees.

Now, the previous administration had numerous initiatives whereby they would eliminate Federal jobs, and they defined their success by how few Federal employees they had. This was a

mistake. What we should have been asking was how much money do we save the American taxpayer, not how many employees we have, how much we are outsourcing and the like.
In some cases the jobs eliminated did not save anything because these jobs were off-budget. They were fee paid for, and they were not costing the taxpayers or the general fund a nickel. In some cases we found out we eliminated Federal jobs, but it ended up costing us more money by going outside. But it was driven by quotas, it was driven by numbers, and I submit that is the wrong approach; and that is the problem with the current legislation, which is why I support the Moran amendment because the current legislation looks at arbitrary percentages and says when it comes to outsourcing and competing things in-house, we are going to look at certain percentages in certain agencies, and we are going to define it by this rather than where do we think we can get the best value for the American taxpayer, not how much money will it save.

There is precious little evidence that the elimination of Federal employees by itself saved money during the previous administration. In some cases, as I noted before, these were fee-based employees, and whatever happened was not going to cost the taxpayers or fee payers a penny, but it was arbitrary. Competitive sourcing is a good thing; but arbitrary quotas, numerical targets, are a bad thing. I would say to this body that the Moran amendment eliminates the arbitrary numbers. This will still allow discretion within Federal agencies to go and compete things. We should encourage them to do that where it makes sense and where we can bring savings to the American taxpayers. Our goal should not be to preserve jobs at the Federal level, nor should it be to get a certain percentage to get outsourced. Our number one priority that should drive procurement policy, how do we get the best value to the American taxpayer, this amendment furthers that goal. That is why I urge my colleagues to support it.

Corporate Expatriates

In the last Congress, considerable controversy surrounded companies – termed "corporate expatriates" as shorthand – like Tyco or Ingersoll-Randwhich transferred their corporate citizenship abroad to Bermuda or similar tax havens to reduce United States taxation, yet continued to seek federal contracts. A House bill, H.R. 3884, "The Corporate Patriot Enforcement Act," also known as Neal-Maloney, to deny contracts to such corporate expatriates, had over 300 cosponsors but was not allowed a floor vote. Rather, a narrow provision was enacted as section 835 of the Homeland Security Act of 2002, codified at 6 U.S.C. 395,just for Homeland Security Department contracts. SARA aims to make permanent, government-wide, certain procurement provisions in the Homeland Security Act. So, here is a version of that Homeland Security Act provision that would also make permanent, government-wide, as to contracts and subcontracts, the corporate expatriate procurement provisions in the Homeland Security Act:

"The Federal Acquisition Regulation shall be revised to bar the award of any contract or subcontract to a foreign incorporated entity which is treated as an inverted domestic corporation under subsection (b) of 6 U.S.C. 395, applying the definitions, special rules, and waiver authority of 6 U.S.C. 395 (c) and (d)."

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I thank the Committee for the opportunity to submit this testimony.